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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DEREK CORNES and MICHAEL DONALD JOHNSON

Appeal 2010-011696
Application 10/560,097
Technology Center 1600

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
MELANIE L. McCOLLUM, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-15 and 18, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The claims are directed to a method for the season-long control of unwanted vegetation (claims 1-15) and a herbicidal composition (claim 18). Claim 1 is representative and is reproduced in the “Claims Appendix” of Appellants’ Brief (App. Br. 15).

Claims 1-6, 10, 15, and 18 stand rejected under 35 U.S.C.
§ 103(a) as unpatentable over the combination of Fenderson¹ and Banks.²

Claims 1, 5, 11-14, and 18 stand rejected under 35 U.S.C.
§ 103(a) as unpatentable over the combination of Feucht³ and Armel.⁴

Claims 1-9, 15, and 18 stand rejected under 35 U.S.C.
§ 103(a) as unpatentable over Hudetz.⁵

We affirm.

The combination of Fenderson and Banks:

ISSUE

Does the preponderance of evidence on this record support a conclusion of obviousness?

FACTUAL FINDINGS

FF 1. We incorporate the Examiner's factual findings (Ans. 5-6) by reference.

FF 2. We note the Examiner's finding that Fenderson and Banks both suggest the application of their formulations to soybean crops for the control of Johnsongrass (Ans. 5 and 6).

FF 3. Fenderson discloses that “[t]he preferred mode of application is tank mix prepared” (Fenderson, col. 4, l. 38).

¹ Fenderson et al., US 5,716,901, issued Feb. 10, 1998.

² P. A. Banks and P. W. Santelmann, *Glyphosate as a Postemergence Treatment for Johnsongrass Control in Cotton and Soybeans*, 69 AGRON J. 579-582 (1977) (Abstract only).

³ Feucht et al., US 6,365,550 B1, issued April 2, 2002.

⁴ Gregory R. Armel, et al., *Mesotrione, Acetochlor, and Atrazine for Weed Management in Corn (Zea mays)*, 17 WEED TECHNOLOGY 284-290 (2003).

⁵ Hudetz et al., US 5,981,432, issued November 9, 1999.

ANALYSIS

Since the claims were not separately argued they stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 1 is representative.

Based on the combined teachings of Fenderson and Banks the Examiner concludes that at the time Appellants' claimed invention was made it would have been *prima facie* obvious to a person of ordinary skill in this art to "substitute glyphosate into the exemplified 3-way formulation taught by Fenderson et al. because Fenderson et al. suggests glyphosate as one of the possible herbicides that can be used in the formulations" (Ans. 7). We find no error in the Examiner's *prima facie* case of obviousness.

Since Fenderson and Banks both suggest the application of their formulations to soybean crops for the control of Johnsongrass (FF 1-2), we are not persuaded by Appellants' contention that Fenderson and Banks are not combinable because Fenderson suggests the treatment of monocotyledon crops such as corn, whereas Banks is concerned with the treatment of dicotyledon crops such as soybean and cotton (App. Br. 12).

While Fenderson's "preferred mode of application is tank mix prepared," we find nothing in Fenderson to require this mode of application (FF 3). Accordingly, we are not persuaded by Appellants' contention that Banks and Fenderson are not combinable because Banks teaches away from Fenderson's tank-mix application by teaching "that over the top applications of glyphosate results in significant visual injury of the crop plant" (App. Br. 12). To the contrary, we find that a person of ordinary skill in the art reading Fenderson and Banks in combination would use an alternative to Fenderson's preferred tank mix (over the top) application method. Further, since Appellants' claim 1 does not require a particular application method,

we are not persuaded by Appellants' contention that "Banks actually teaches away from the solution offered by the present invention" because "Banks would suggest injury to the crop plant would result" from over the top (tank mix) application methods (*id.*)

CONCLUSION OF LAW

The preponderance of evidence on this record supports a conclusion of obviousness. The rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fenderson and Banks is affirmed.

Claims 2-6, 10, 15, and 18 fall together with claim 1.

The combination of Feucht and Armel:

ISSUE

Does the preponderance of evidence on this record support a conclusion of obviousness?

FACTUAL FINDINGS

FF 4. We incorporate the Examiner's factual findings (Ans. 8-10) by reference.

FF 5. The method of claim 1 "utilizes 'comprising' language . . . and thus, does not limit pre-emergence applications" (Ans. 15).

FF 6. The Examiner interprets claim 1 to "encompass pre-emergence applications of the herbicidal composition and limited to only one post emergence application of the instant herbicidal combination" (*id.*).

ANALYSIS

Since the claims were not separately argued they stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 1 is representative.

Based on the combined teachings of Feucht and Armel the Examiner concludes that at the time Appellants' claimed invention was made a person of ordinary skill in this art would have found it *prima facie* obvious to "incorporate a 2-(substituted benzoyl)-1,3-cyclohexanedione (i.e. mesotrione) into the formulations taught by Feucht et al., since it is mesotrione is an effective postemergence herbicide that is used on the same crops (i.e. corn) and used to treat the same weeds (i.e. Johnsongrass) as suggested by Feucht" (Ans. 10). We find no error in the Examiner's *prima facie* case of obviousness.

Appellants contend that Armel "does not envisage a single post-emergence application of mesotrione," instead "Armel clearly suggests that effective weed control requires both pre- and post- application of mesotrione" (App. Br. 13). We are not persuaded. As the Examiner explains, claim 1 places no restriction on the number of pre-emergent applications of a herbicidal formulation, instead claim 1 requires that only a single post-emergent application be administered (FF 5-6).

CONCLUSION OF LAW

The preponderance of evidence on this record supports a conclusion of obviousness. The rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over the combination of Feucht and Armel is affirmed. Claims 5, 11-14, and 18 fall together with claim 1.

The rejection over Hudetz:

ISSUE

Does the preponderance of evidence on this record support a conclusion of obviousness?

FACTUAL FINDINGS

FF 7. We incorporate the Examiner's factual findings (Ans. 11-12 and 16) by reference.

FF 8. Appellants define the term "season" as "generally up to 120 days long, for example from 40 to 120 days, such as 50 to 120 days long" (Spec. 2: 4-7).

FF 9. The Examiner finds that "since the herbicidal compositions taught by Hudetz et al. are shown to be effective 18 days after application . . . and since Applicant[s] . . . described the length of time required for seasonal control to be 'up to 120' in the instant specification . . . the limitation is met" (Ans. 13).

ANALYSIS

Since the claims were not separately argued they stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 1 is representative.

Based on Hudetz the Examiner concludes that at the time of Appellants' invention a person of ordinary skill in this art would have found it *prima facie* obvious to combine "2-(substituted benzoyl)-1,3-cyclohexanedione (i.e. sulcotrione) or metal chelate thereof, an acetamide (i.e. S-metolachlor), and glyphosate or a salt thereof, and apply it postemergence to unwanted vegetation for the purpose of broadening the spectrum of activity against weeds as well as achieving a high degree of weed control" (Ans. 13). In addition, the Examiner reasons that while Hudetz

does not specifically teach seasonal control of unwanted vegetation . . . since the herbicidal compositions taught by Hudetz et al. are shown to be effective 18 days after application . . . and since Applicant[s] . . . described the length of time

required for seasonal control to be “up to 120” in the instant specification . . . the limitation is met.

(Ans. 13.) We find no error in the Examiner’s *prima facie* case of obviousness.

A reference disclosure is not limited only to its preferred embodiments, but is available for all that it discloses and suggests to one of ordinary skill in the art. *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976); *In re Mills*, 470 F.2d 649, 651 (CCPA 1972). Accordingly, we are not persuaded by Appellants’ contentions regarding the scope of the “specific exemplification” or “specific examples” in Hudetz (App. Br. 13-14).

Hudetz suggests a herbicidal formulation “comprising S-metolachlor . . . and *at least one additional herbicide* selected from glyphosate, sulcotrione, etc.” (Ans. 11.) Accordingly, we are not persuaded by Appellants’ contention that “while the individual herbicidal components may be referred to by Hudetz” (App. Br. 14) the 3-way combination of herbicides required by Appellants’ claim 1 could only be obtained by improper hindsight reconstruction of Appellants’ claimed invention. The prior art’s disclosure of a multitude of combinations does not necessarily render any particular formulation less obvious. *Merck & Co., Inc. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989).

Lastly, because Appellants define the term “season” as up to 120 days (FF 8) and Hudetz suggests the effective control of weeds for 18 days, we are not persuaded by Appellants’ contention that Hudetz “certainly does not envisage a method for season long weed control comprising a single post-emergence application” (App. Br. 14). To the contrary, 18 days falls within

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Appellants' disclosed range of up to 120 days and therefore properly reads on the claimed limitation (*see* Ans. 13).

CONCLUSION OF LAW

The preponderance of evidence on this record supports a conclusion of obviousness. The rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Hudetz is affirmed. Claims 2-9, 15, and 18 fall together with claim 1.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cdc